87-1432

No. .....

In The

Supreme Court of the United States

October Term, 1987

A.C., A.C., S.C., S.C., and J.C.,

Petitioners,

vs.

STATE OF IOWA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF IOWA

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QUESTIONS PRESENTED FOR REVIEW

1. Were the five petitioner foster children denied due process and equal protection of the laws when they were arbitrarily removed from a long-term foster home placement, separated from their siblings, and placed in the homes of strangers without any rights under Iowa law to a meaningful hearing?

2. Should the Iowa Supreme Court and trial court be permitted to evade federal questions and ignore federal rights asserted at both levels and sanction the attorney for raising them?

PARTIES

The petitioners in this Court are five foster children, A.C., A.C., S.C., S.C., and J.C., represented by their attorney and guardian ad litem, Jane Harlan. She was the appellant as the guardian ad litem for the children in the proceedings below. The respondents are the State of Iowa and K.C., the natural mother, whose rights were terminated in the proceedings below.

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Petitioners pray that a writ of certiorari issue to review the decision of the Supreme Court of Iowa filed November 25, 1987.

OPINION BELOW

The decision of the Supreme Court of Iowa was filed on November 25, 1987, and is set forth in the Appendix, p. 1.

———o———

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

———o———

STATEMENT OF THE CASE

This is an appeal by the attorney and guardian ad litem concerning the removal of five children from a long-term foster home placement. It involves a series of decisions by the trial court concerning the denial of an application for an injunction to prevent the removal, the trial court's removal of the children's attorney, and evasion by the trial court and Iowa Supreme Court of federal questions raised. The courts also imposed sanctions on the children's attorney for raising and asserting federal rights in the state courts for her clients and herself.

On March 22, 1985, the Iowa Department of Human Services petitioned the juvenile court that five children ranging in age from an infant to a 10 year old should be found children in need of assistance. They were placed with the M. foster family while their natural mother entered the hospital for psychiatric care. On the same day Jane Harlan was appointed attorney and guardian ad

litem for the children. On May 13, 1985, the children were adjudicated to be children in need of assistance. In September of 1986, the Iowa Department of Human Services made plans to move the children to two separate foster homes in another community to be near their natural mother.

On September 8, 1986, the children's attorney filed an application for a temporary injunction to prevent the removal. She further requested termination of parental rights, and a rehearing as to disposition. The application for a temporary injunction to prevent the removal was denied with the court ruling that the children were not entitled to due process concerning such a decision.

The Iowa Administrative Code provides foster families with the right to meet with a district administrator of the Department of Human Services to challenge a removal decision. There is no opportunity for a hearing or court review. (See Appendix, p. 19).

In the instant case the children experienced a grievous loss due to the actions of the state. In anticipation of the move A.C. (1) and A.C. (2) attempted to purchase sleeping pills with plans of suicide in mind. A psychologist said that threats of suicide by A.C. (1) should be taken seriously. Another psychologist described the probable reaction of the children to a move as "traumatic". On January 2, 1987, the trial court denied the petition for termination of parental rights and recommended that the children be moved. On January 8, 1987, the five children were separated from each other and moved to the homes of strangers.

On January 21, 1987, the children's attorney filed a motion asking that the children be removed from the custody of the Department of Human Services at the upcoming disposition hearing. The application alleged that the Department had separated the children from each other, placed them in very restrictive environments; and that they had been denied free and unmonitored contact with each other, their psychological parents, and with their attorney. (See Appendix, p. 20).

Two days later the State moved that the attorney for the minor children be directed to withdraw as counsel for the children.

The trial court removed the children's attorney from continued representation of the children following a hearing in which she and the children were not notified of the issues to be raised in advance. Even though she asserted her First Amendment rights at the hearing, one of the reasons given for the removal was her discussion of public information about the case with the press. On March 24, 1987, the court issued an order summarily reducing her fees from $5,700.00 claimed to $500.00.

On appeal to the Supreme Court of Iowa, the appellate court issued a decision on November 25, 1987. Parental rights of the natural mother were terminated. The Supreme Court rejected the argument that the children's rights to due process or equal protection had been violated as raised in appellant's brief. It found no error in the court's determinations that the children's attorney be removed from representing them or the drastic reduction of her fees. The federal issues raised in appellant's brief were seen as devices to permit the children to maintain

their relationship with the foster parents and therefore inconsequential. The court further found that the attorney should have filed a second notice of appeal concerning the federal issues even though she had been removed from the case, and ordered to not file anything further by the trial court during the appropriate time period. (See decision in Appendix, p. 16).

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REASONS FOR GRANTING THE WRIT

I

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE IOWA SUPREME COURT DENIED THE PETITIONERS THE RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF THE LAWS.

The question of whether foster families have a liberty interest which merits constitutional protection was left open by the court in *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 855 (1977). However the court recognized that

> "biological relationships are not exclusive determination of the existence of a family . . . the importance of the familial relationship, to the individuals involved and to the society stems from the emotional attachments that derive from the intimacy of daily association . . . At least where a child has been placed in foster care as an infant, has never known his natural parents, and has remained continuously for several years in the care of the same foster parents, it is natural that the foster family should hold the same place in the emotional life of the foster child, and fulfill the same socializing functions as the natural family. *Smith*

v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, 843, 844.

The court has shifted in emphasis away from recognizing the mere existence of a biological link to one in which the responsibility actually assumed by a parent is regarded as a factor in determining the due process rights accorded. *Lehr v. Robertson,* 463 U.S. 248 (1983). *Quilloin v. Walcott,* 434 U.S. 246 (1978).

The procedural and substantive due process rights of foster parents and foster children have been increasingly recognized. Foster parents have been viewed as having standing to litigate issues concerning the children in their care. *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 842, ft. 45(10b). *In Re B.G.,* 523 P.2d 244, 253 (Cal. 1974). *McLaughlin v. Pernsley,* 654 F. Supp. 1567 (E.D. Pa., 1987). *Scearce,* 345 S.E.2d 404 (N.C. Ct. App., 1986).

Foster parents have been found to be entitled to due process concerning removal of foster children from their home and failure to recertify them as foster parents. *Goldstein v. Lavine,* 418 N.Y.S. 2d 845 (1979).

Protected liberty interests entitled to due process protection can arise under ~~state~~ law. In *Brown v. County of San Joaquin,* the court held as follows:

> "One source for the identification of protected liberty interests is state law. (footnotes omitted) When a state by its enactments creates the expectation that certain interests will be protected absent specified good cause, then the state must afford the individual procedural due process before upsetting that expectation. California law does create the expectation that

> a foster family relationship of significant duration will be protected from arbitrary destruction. 601 F. Supp. 653, 658 (E.D. Cal., 1985).

Contrary to the language of the Iowa Supreme Court in its decision in the instant case, Iowa law similarly creates an expectation that a foster family relationship will not be arbitrarily destroyed. Iowa Statute Sec. 232.102(6) states as follows:

> "When the child is not returned to the child's home and if the child has been previously placed in a licensed foster care facility, the department or agency responsible for the placement of the child shall consider placing the child in the same licensed foster care facility.

The Iowa Supreme Court has repeatedly held that a stable environment is of primary importance for children. *In Interest of Leehey,* 317 N.W.2d 513, 516 (Iowa Ct. App., 1982). Having created an expectation of an enduring relationship in the foster family, the state must afford the parties to that relationship due process before it can be arbitrarily terminated.

Children are entitled to the equal protection of the laws with relation to other children. *Brown v. Board of Education,* 349 U.S. 294 (1954). The right to form a family relationship for an adult is considered to be a fundamental right. The United States Supreme Court has held that statutory classifications that discriminate against some adults concerning the right to marry are subject to "strict scrutiny" by the court because of the nature of the interest involved. *Zablocki v. Redhail,* 434 U.S. 374 (1978). The right to form family relationships is of the same or

greater fundamental importance for a child as the right to marry is for an adult. Goldstein, *Beyond the Best Interests of the Child,* pp. 20-28. A small child cannot survive without a significant relationship with an adult caretaker. Children not involved in the foster care system are able to enter into family relationships without the fear that the state will destroy that relationship in the absence of good cause. Statutes and policies that deprive foster children of the right to enter into significant relationships without the interference of the state deprive foster children of the equal protection of the laws. They should be strictly scrutinized and required to advance a sufficiently important state interest before they can be upheld.

In the instant case the Iowa Supreme Court determined that attachments formed by children while in foster care could not be legally recognized because of the commitment of the State to returning children to the biological family. In the same decision they determined that the rights of the one significant biological parent should have been terminated. No doubt the Court felt that both decisions were made in the "best interests of the children."

II

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE IOWA SUPREME COURT FAILED TO RECOGNIZE ESTABLISHED PRINCIPLES OF FEDERAL LAW CONCERNING THE RIGHTS OF PERSONS IN THE CUSTODY OF THE STATE.

In *Procunier v. Martinez,* 416 U.S. 396, 417 (1974) the United States Supreme Court ruled that prisoners in the custody of the state have a liberty interest within the Fourteenth Amendment in receiving uncensored communi-

cation which is protected from arbitrary governmental invasion, and the right to have reasonable access to attorney services. Juveniles have rights to freedom of expression. *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). Juveniles in the custody of the state retain their First Amendment rights to uncensored contact with the outside world. *Nelson v. Heyne,* 355 F. Supp. 451, 457 (1972). Parents do not have the authority to authorize the state to limit a child's liberty without good cause. *Milonas v. Williams,* 691 F.2d 931, 943 (10th Cir., 1982). The United States Code requires that children in foster care be placed in the least restrictive environment. 42 U.S.C. § 675(5)(A).

The trial court evaded the above issues by removing the attorney who raised them. The Iowa Supreme Court considered the above issues inconsequential because they would have enabled the children to maintain a relationship with the foster parents. (See App. at p. 11).

III

THE WRIT SHOULD BE GRANTED BECAUSE THE DECISION OF THE IOWA SUPREME COURT CALLS FOR THE EXERCISE OF THE SUPREME COURT'S SUPERVISORY POWERS.

The decision making of the Iowa courts in this instance turns juvenile justice into a travesty. State agencies are permitted total discretion to eliminate the rights of the children in their care. Attorneys who attempt to work for their clients instead of the state can be removed from the case without any due process. Children can lose everything without any due process. Children can be held in

"temporary" placements for years, with no right to have relationships formed during that period recognized by the court. Children with incompetent natural parents can be denied the opportunity to enter family relationships with anyone else. Visits between children and their attorneys can be monitored by the state. Attorneys who assert federal rights for their clients and themselves can be sanctioned by the court in response. Courts can engage in the questionable practice of making findings of fact that are totally unsupported by any evidence on the record.

The Iowa Supreme Court's decision flies in the face of most of the fundamental rights of persons as developed by the United States Supreme Court.

CONCLUSION

The writ should be granted because the decision of the Iowa Supreme Court has fundamental implications concerning the rights of thousands of children in the nation's foster care system. Children are the nation's most important natural resource. Children in foster care have a strong likelihood of coming from troubled families. Foster children have already lost their traditional relationship with their biological parents. While the goal of reuniting the natural family is an admirable one, it cannot justify the deprivation of a small child from forming any family relationships for extended periods. When courts focus on biological factors and exclude actual relationships, they perform a terrible disservice to children.

This case involves more than the traditional disputes over the fine points of federal law. It involves questions of whether a class of persons known as foster children are entitled to any constitutional protections whatsoever.

Respectfully submitted,

JANE A. HARLAN
300 Midtown Building
Newton, Iowa 50208

Attorney and Guardian ad Litem for Petitioners

IN THE JUVENILE COURT IN AND
FOR JASPER COUNTY

IN THE INTEREST OF:)	JUVENILE NO. J5-411H
)	
A.C., A.C.,)	ORDER FOR
S.C., S.C.,)	APPOINTMENT
and J.C.,)	ATTORNEY AND
)	GUARDIAN AD LITEM
CHILDREN)	

BE IT REMEMBERED that subject children named above, will appear in Jasper County Juvenile Court at 1:30 o'clock on the 1st day of April, 1985, in the Courtroom at the Jasper County Courthouse in Newton, Jasper County, Iowa.

The Court upon investigating the petition finds an attorney should be appointed to protect the interest of the above named child.

IT IS ORDERED that Jane Harlan, a licensed attorney practicing in Jasper County, Iowa, shall be the attorney to protect the interest of the above-named child in this Juvenile Court matter. The child's parents shall pay his fees absent an Order to the contrary.

Dated this 22nd day of March, 1985.

/s/ Thomas Mott
Juvenile Judge, Fifth Judicial District of Iowa

IN THE SUPREME COURT OF IOWA

IN THE INTERESTS OF A.C., A.C., S.C., S.C., and J.C., Minor Children,	)	Filed November 25, 1987
Appellants,	)	274
K.C., Natural Mother,	)	87-43
Appellee.	)	

Appeal from the Iowa District Court for Jasper County, Thomas W. Mott, District Associate Judge.

Juvenile proceeding, including a petition to terminate parent-child relationship. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Jane A. Harlan, Newton, for appellants.

Gerald B. Feuerhelm, Des Moines, for appellee natural mother.

Thomas J. Miller, Attorney General, Gordon E. Allen, Deputy Attorney General, Charles K. Phillips, Assistant Attorney General, John Billingsley, County Attorney, and Clifford D. Wendel, Assistant County Attorney, for the State.

P. Lewis Pitts, Jr., and Gayle Korotkin, Chapel Hill, North Carolina, for amicus curiae Christic Institute South.

Considered by Harris, P.J., and Larson, Schultz, Lavorato, and Neuman, JJ.

HARRIS, P.J.

Five children, ranging in age from three months to ten years, were voluntarily placed under foster care by their mother on March 14, 1985. The placement soon became involuntary and this dispute centers around efforts by the Iowa department of human services to rehabilitate the mother and conflicting efforts by the foster parents to wrest the children from both their mother and the department. The district court, sitting as juvenile court, determined that efforts to help the mother to acquire parenting skills should continue. Hence the juvenile court rejected a petition to terminate the parent-child relationship. The court also rejected claims that custody of the children should remain with the foster parents. We think the parent-child relationship with the mother should be terminated.[1] We agree with the juvenile court's rejection of the other claims.

It is readily apparent why the mother felt driven to voluntarily place the children into foster care and why the department felt compelled to resist her attempts to withdraw the placement. The mother suffers from a bipolar mental illness which causes an antisocial personality. She was hospitalized for this condition in Newton from March 1985 until May 15, 1985. She was then admitted to a group care facility at Ames, where she stayed until August 1986. She was thereafter removed to a halfway house in Cedar Rapids where she remained under counseling at the time of the hearing in juvenile court.

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[1]None of the children's three fathers are party to this action or appeal.

The evidence is overwhelming that, because of the mother's tragic condition, the children were physically neglected and abused. The children were ill-fed and were for the most part compelled to rely on one another for routine care and feeding. A department social worker described the mother's house as it appeared in early 1985:

> The home was in substandard condition. There were windows broken out of the home.

The same witness earlier testified:

> There was no food present in the house for the children particularly the infant child, [J.C.], who is three or four months old at this time. There was dog feces laying around the home which three year old [S.C.] proceeded to track around the whole house while we were there talking about placing the children. It's the worst cockroach situation I have ever seen. They were crawling on the walls in broad daylight which is not real typical, in everything we opened it was just infested with cockroaches. There were dirty dishes and clothing piled up around the house. We couldn't find any clothing to take for any of the five children that day, not even a pair of socks to put on [S.C.] to leave with.

The witness did express the opinion that the mother was not incapable of parenting the children but, when asked whether there was any way to scale her parenting abilities, replied: "On a motivational scale I think she is real high. I don't know how she would place on an abilities scale."

The two eldest children are bitterly hostile to their mother because of the neglect and because of violent physical abuse heaped upon the children by the mother and

one of the mother's boyfriends. They related how one of the children's hair was pulled out by the mother. They also described beatings by the mother with a board and with a chain dog leash.

The mother is remorseful over her treatment of the children. She attributes her conduct, which she feels the children exaggerated, to her illness. At the time of her testimony she believed her illness was being controlled by medication and the counseling she was then receiving at the halfway house. She conceded, however, she was not yet well.

Professional witnesses, testify in the mother's behalf, were only cautiously optimistic about the mother's chance of improving. A psychiatrist familiar with the case testified:

> A bipolar illness is a cyclical illness. It means that it comes and goes. And a person can go through life and have several cycles or episodes of the disease, and all of a sudden it will go away. It may not reappear again, and it may reappear. It is hard to say. So . . . the medication is usually used to abate the cycle that a person is already in. It's possible that she could even go off her medicine and do well for the rest of her life. It's possible that she could go off her medicine and get sick again, or it's possible she could stay on her medicine and do well. It's really hard, because we can't predict the course of the illness. But as long as she maintains contact with somebody—and we know what medications now work because she's been on the medicine, so her prognosis can be good, and she can become functional again.
>
> Q. Do you have any impression as to her potential for being able to care for five children? A. Well, that's a difficult question for me to answer as a psy-

> chiatrist. In my last two contacts with her, it's my feeling that there's not—there is no psychiatric reason now why she should not be able to care for her children. I certainly would not want to jump into it immediately. I would like—I think it should be something that is gradually done. But I have a lot of people who are bipolar patients who take their medication and do quite well as mothers and fathers. So long as she maintains herself on the medicine and she appears well and has contact with somebody who can assess how she's doing, I think it's possible.

No psychologist, psychiatrist, or other expert testified that the natural mother would be able to take care of her children in the near future. At best, from the mother's point of view, they merely testified there was no psychological reason she could not.

The department placed the children in the temporary care of Larry and Paula Mick, where they remained for about eighteen months. Not unexpectedly, in view of the children's past environment, a strong bond soon developed between the children and the Micks. The bonding was no accident. We emphatically agree with the juvenile court's conclusion that the Micks resolutely set out to make the temporary placement a permanent one, a charge they and the children deny.

I. Jane A. Harlan, a Newton lawyer who is a second cousin of Larry Mick, was appointed guardian ad litem for the children and in that capacity brought this proceeding under Iowa Code chapter 232 to terminate the relationship between the children and their natural par-

ents.[2] The juvenile court's refusal to terminate the relationship is the first and principal issue in the case.

The juvenile court found that the mother could resume her parental role. It was persuaded by testimony that the natural mother, through medication and counseling, was able to control her mental illness and there was no reason she could not take care of her children.

Iowa Code section 232.116(5) (1985) states that the court may order termination of the parent-child relationship if it finds:

> a. The child has been adjudicated a child in need of assistance pursuant to section 232.96; and
>
> b. The custody of the child has been transferred from the child's parents for placement pursuant to section 232.102 for at least twelve of the last eighteen months; and
>
> c. There is clear and convincing evidence that the child cannot be returned to the custody of the child's parents as provided in section 232.102.

Of these three requirements there is no question here that (a) the children were adjudicated children in need of assistance, and (b) custody of the children was transferred from the natural mother for placement for at least twelve of the last eighteen months.

The provision at issue here is (c). We must examine the record to determine whether there was clear and con-

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[2]Incredibly, the guardian ad litem failed or neglected to secure adequate service of notice on any of the three fathers of the children. This inexcusable failure seems highly likely to further aggravate the children's problems because a final permanent disposition must accommodate the various fathers' rights.

vincing evidence that the children cannot be returned to the mother's custody.

We explained in *In re T.D.C.*, 336 N.W.2d 738 (Iowa 1983):

> Several previously enunciated principles have served to guide our examination of the record before us. Appellate review of the proceedings to terminate a parent-child relationship is de novo; thus "it is our duty to review the facts as well as the law and adjudicate rights anew on those propositions properly preserved and presented to us." We accord weight to the fact findings of the juvenile court, especially when considering the credibility of the witnesses whom the court heard and observed firsthand, but we are not bound by those findings.
>
> Central to a determination of this nature are the best interests of the child. In this connection we look to the child's long range as well as immediate interest. Hence, we necessarily consider what the future likely holds for the child if returned to his or her parents. Insight for this determination can be gained from evidence of the parent's past performance, for that performance may be indicative of the quality of the future care that parent is capable of providing.

Id. at 740-41 (quoting *In re Dameron*, 306 N.W.2d 743, 745 (Iowa 1981)) (citations omitted).

The State has the duty to assure that every child within its borders receives proper care and treatment, and must intercede when parents fail to provide it. *In re Dameron*, 306 N.W.2d at 745. Our current statutory provisions are preventative as well as remedial. *Id.* Child custody should be quickly fixed and little disturbed. *In re Kester*, 228 N.W.2d 107, 110 (Iowa 1975). Children

should not be made to suffer indefinitely in parentless limbo. *Id.*

In determining whether there is clear and convincing evidence that the children cannot be returned to the care of their mother, we are not to engage in a comparison of the mother's home with the foster home. We have said:

> Presumably every foster home will provide good care. The parent's right to have a child returned, however, is not measured by comparing the parent's home to the foster home or an ideal home. Rather the parent's right is established by negating the risk of recurrence of harm.

In re Blackledge, 304 N.W.2d 209, 214-15 (Iowa 1981).

There are a number of stern realities faced by a juvenile judge in any case of this kind. Among the most important is the relentless passage of precious time. The crucial days of childhood cannot be suspended while parents experiment with ways to face up to their own problems. Neither will childhood await the wanderings of judicial process. The child will continue to grow, either in bad or unsettled conditions or in the improved and permanent shelter which ideally, at least, follows the conclusion of a juvenile proceeding.

The law nevertheless demands a full measure of patience with troubled parents who attempt to remedy a lack of parenting skills. In view of this required patience, certain steps are prescribed when termination of the parent-child relationship is undertaken under Iowa Code chapter 232. But, beyond the parameters of chapter 232, patience with parents can soon translate into intolerable hardship for their children.

Our statutory scheme for protecting the rights of natural parents in termination proceedings was carefully crafted as a legislative response to federal court decisions which held our prior parental termination statutes unconstitutional. *See Alsager v. District Court,* 406 F. Supp. 10 (S.D. Iowa 1975), *aff'd,* 545 F.2d 1137 (8th Cir. 1976). Although it was incumbent upon our legislature to react to these holdings it would be wrong for our courts to thereafter overreact to them.

It is unnecessary to take from the children's future any more than is demanded by statute. Stated otherwise, plans which extend the twelve-month period during which parents attempt to become adequate in parenting skills should be viewed with a sense of urgency. Of course some suggested extensions will prove to be appropriate. The judge considering them should however constantly bear in mind that, if the plan fails, all extended time must be subtracted from an already shortened life for the children in a better home.

Expert testimony suggested that a continued relationship with the mother could be justified at least in part because the children need to face up to the extreme hostility they feel. According to the testimony, the children must work through and resolve their bitter resentment of their mother. We in no way disparage the view that serious hostile feelings and resentments are matters to be dealt with. We are nevertheless convinced that these children should not for that reason alone be returned to their mother. For the children, the cure would be much worse than the disease. Another way must be found to help them deal with their resentments.

In view of the availability of the department's efforts in her behalf, it is not controlling here that the mother has no home, no money, no current skills, no job and no real prospects of acquiring any. What is of controlling importance is her total inability to mother the children. It seems inescapable to us that the mother has no realistic chance to become adequately equipped to care for these children during the years remaining in their childhood. Her mental illness, though cruelly unfair from her point of view, continues a threat to those around her. She has shown she cannot care for herself, much less for five children.

It is past time to terminate her relationship with the children. We order it done.

II. Ms. Harlan was removed as guardian ad litem following the proceedings in juvenile court but, as attorney for the children, assigns error in rulings which she considers adverse to the children's rights to maintain their relationship with the foster parents. We find no error in assignments.

Our review of ordinary custody cases is de novo. *In re Blackledge,* 304 N.W.2d 209, 210 (Iowa 1981). We employ the same scope of review in children-in-need-of-assistance proceedings under section 232.102. *In re J.R.H.*, 358 N.W.2d 311, 317 (Iowa 1984). Of course the Micks' situation as foster parents distinguishes this proceeding from the ordinary custody dispute.

There is a pressing societal need for temporary foster homes. The child victims of abuse are in desperate need of shelter and care. During the time required for

courts or officials to procees and consider their needs, the children must be nurtured in a safe environment.

It should be apparent that one of the paramount needs of a child living under the stress of such unfortunate circumstances is to be free from direct or indirect proposals by those sheltering them to make the association permanent. To some it may seem innocent, even a good thing, to offer a permanent love to the child under temporary care. But unselfish temporary parents recognize that such a bonding is not kind. On the contrary it tends to be selfish on the part of the adults and is highly likely to be harmful to the child.

Temporary foster relationships must be designed with the knowledge they will almost certainly end in separation. The children often return to their natural parents. Often another solution must be found. Separation from foster parents holds the potential to be a painful experience. Such a separation would become unnecessarily cruel if the foster parents have led the children to believe placement in their home was permanent.

We agree with the juvenile court's conclusion that it was in the best interests of the children to change their placement from the Micks. Parental rights of the mother were very much in issue at the time placement was ordered changed. The three fathers of the children were not yet subject to the court's jurisdiction. Options for the children's future had to be kept open. It was crucial that the children be under the care of foster parents who could and would refrain from seeking to bond a permanent relationship.

III. We also find no due process violation in moving the children from the Micks' home. It is contended that the children have a constitutionally protected liberty interest in a permanent living situation, a facet of the right to family privacy.

In order to make out a claim of deprivation of fourteenth amendment due process rights, a person must show: (1) deprivation of a liberty interest protected by the fourteenth amendment; and (2) the procedure used to deprive that interest was constitutionally deficient. *Board of Regents v. Roth,* 408 U.S. 564, 569-71, 92 S. Ct. 2701, —, 33 L. Ed. 2d 548, 556-57 (1972). The United States Supreme Court has stated that liberty denotes not merely freedom from bodily restraint but also freedom to marry, to establish a home and to bring up children. *Meyer v. Nebraska,* 262 U.S. 390, 399, 43 S. Ct. 625, —, 67 L. Ed. 2d 1042, 1045 (1922).

State statutes may create liberty interests which are entitled to due process. *Vitek v. Jones,* 445 U.S. 480, 488, 100 S. Ct. 1254, —, 63 L. Ed. 2d 552, 561-62 (1980). When no right or justifiable expectation is created a state can act without providing due process. *See, e.g., Meachum v. Fano,* 427 U.S. 215, 228, 96 S. Ct. 2532, —, 49 L. Ed. 2d 451, 461 (1976).

In *Smith v. Organization of Foster Families for Equality and Reform,* 431 U.S. 816, 97 S. Ct. 2094, 53 L. Ed. 2d 14 (1977), the court declined to decide whether a liberty interest exists in foster family relationships. Other authorities indicate that it does not. *See Kyees v. County Dep't of Pub. Welfare,* 600 F. 2d 693, 698 (7th Cir. 1979); *Drummond v. Fulton County Dep't of Family*

and Children's Servs., Inc., 563 F.2d 1200, 1207 (5th Cir. 1977). *But see Brown v. City of San Joaquin*, 601 F. Supp. 653, 662 (E.D. Cal. 1985).

Under these authorities the key question becomes whether Iowa law creates the expectation that the foster family relationship will be permitted to continue after the children have resided with foster parents for a certain period of time. Iowa law clearly does not create such an expectation.

As we have tried to make clear, the child in foster placement needs first of all to reach a good permanent placement. Time is of the essence. We have already learned of the harm that results to the children by the agonizing delays in our existing process. It would be decidedly antagonistic to the children's best interests to erect another panoply of due process rights for still another group, to be litigated and appealed before there could be a resolution of the children's plight.

We reject the due process challenge.

IV. The former guardian ad litem contends the removal of the children from the foster home denied them equal protection of the laws. It is argued that statutes and policies applied here deprived the foster children of the right to enter into significant relationships without state interference, a right that would not be denied children who were not involved with foster care.

At the threshold of any equal protection claim it is necessary to decide the type of scrutiny to be given the challenged activity. *Mills v. State*, 308 N.W.2d 65, 66 (Iowa 1981). Strict scrutiny is employed only when a fundamental right or suspect class is involved. *Veach v.*

Iowa Dept's of Transp., 374 N.W.2d 248, 249 (Iowa 1985). Suspect classifications are generally based on race, alienage or national origin. *State v. Martin*, 383 N.W.2d 556, 559 (Iowa 1986). Strict scrutiny requires that a compelling interest be served by the discrimination. *Johnson v. Charles City Community Schools Bd. of Educ.*, 368 N.W.2d 74, 84-85 (Iowa), *cert. denied*, — U.S. — (1985). If the classification does not involve a fundamental right or a suspect class, it is subject to the rational basis test. *Veach*, 374 N.W.2d at 249. Under the rational basis test, a class distinction will survive if it rationally furthers a legitimate state interest. *Id.* The nature of the scrutiny to be employed here does not change the outcome. The challenge fails under either test.

The rational basis test is easily passed. Temporary foster homes rationally further the state's legitimate interest in maintaining children in a relationship with their natural parents. Removal from a temporary home does the same thing.

The strict scrutiny test is also passed. As noted, under a strict scrutiny test the first question is whether there is a compelling state interest in the classification. When adults can show they will be good parents to their children the state has a compelling interest in reuniting the children with those parents, even when the children have become attached to foster parents.

The second question under the strict scrutiny test is whether removing children from a foster home which discourages reunification is necessary to achieve the state's interest in preserving the children's relationship with their natural parents. We think the answer is clearly yes.

The equal protection challenge is without merit.

V. The former guardian ad litem urges a number of other assignments, only some of which are appropriate for appellate review. We find no merit in a challenge to a discretionary ruling which rejected a motion to remove the natural mother's attorney from the case. Certain motions were filed after jurisdiction in juvenile court had been lost by the bringing of this appeal. *Hulsing v. Iowa Nat'l Mut. Ins. Co.*, 329 N.W.2d 5, 7 (Iowa 1983). We give them no consideration.

The children's attorney, who was removed as their guardian ad litem, protests the allowance of only $500 of the $5700 she claimed for legal services. The order setting fees was discretionary. *Hulse v. Wifat*, 306 N.W.2d 707, 709 (Iowa 1981). We find no abuse.

Compensation should be fixed much the same as in criminal cases: for "the time necessarily spent, the nature and extent of the services, . . . responsibility assumed and results obtained, the standing and experience of the attorney in the profession, . . . the customary charges for similar services" and the certainty of payment from the public treasury. *Hulse*, 306 N.W.2d at 711.

A number of factors support the trial court's exercise of discretion. The quality of the services was poor. We have already noted that jurisdiction was not obtained over the fathers. We have received for filing the disciplinary commission's public reprimand of Ms. Harlan for professional misconduct in these proceedings for making extrajudicial statements. As we have mentioned, she is the second cousin of Mr. Mick, the foster father. She should not be compensated as attorney for the children for any efforts which were expended to further the

private wishes or interests of the Micks. We find no abuse in the finding that $500 was the value of that part of her services which were necessarily expended in representing the children.

To detail other contentions would unduly extend this opinion. We order termination of the parental relationship between the children and their natural mother. We remand the case to juvenile court with directions that the department proceed immediately to seek jurisdiction over the natural fathers of the children and, as soon as possible, to obtain a permanent resolution of their placement.

AFFIRMED IN PART REVERSED IN PART, AND REMANDED.

All Justices concur except Neuman, J., who dissents.

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274 In re A.C.

NEUMAN, J. (dissenting).

I concur in divisions II through V of the majority opinion, but I respectfully dissent from division I.

By characterizing the juvenile court's action as no more than a protracted effort "to help the mother acquire parenting skills," the majority has, in my opinion, minimized the tragedy of this case. What the juvenile court in fact recognized—along with every other expert who testified—was K.C.'s extraordinary effort to overcome a debilitating mental illness which virtually destroyed her ability to care for herself, let alone five children, until proper diagnosis made recovery a possibility.

Because this mother, through no fault of her own, has not progressed in her recovery at the speed the majority's timetable would suggest, her parental rights are being irrevocably terminated. By choosing this extraordinary remedy, the majority has substituted its judgment for that of *every* expert called to testify, whether by the State or Jane Harlan. All pointed to reunification of the family as not only the most desirable goal, but one that was realistically attainable. All cited the tremendous strides K.C. has made in achieving that goal. Not one proposed termination of parental rights as being in the best interest of the C. children.

A year has now passed since this case was heard by the juvenile court. Intervening events may prove the majority's prediction of K.C.'s incapacities correct. But our task is to affirm or reverse the judgment of the juvenile court based on the evidence before it. Under this record, I would have affirmed the court's dismissal of the termination petition.

IOWA ADMINISTRATIVE CODE

§ 202.13(3) If a foster family objects in writing within seven (7) days from the date that the information of plans to remove the child is mailed, the district administrator shall grant a conference to the foster family to determine that the removal is in the child's best interest.

This conference shall not be construed to be a contested case under the Iowa administrative procedure Act, Iowa Code chapter 17A.

The conference shall be provided before the child is removed except in instances listed in 202.13(1) "*a*" through "*c*". The district administrator shall review the propriety of the removal and explain the decision to the foster family.

The district administrator, on finding that the removal is not in the child's best interests, may overrule the removal decision unless a court order or parental decision prevents the department from doing so.

App. 20

IN THE IOWA DISTRICT COURT FOR
JASPER COUNTY

(JUVENILE DIVISION)

IN THE INTEREST OF A.C., A.C., S.C., S.C., and J.C. Minor Children.	Juvenile No. J5-411a *APPLICATION FOR MODIFICATION OF DISPOSITIONAL ORDER.*

(Filed January 21, 1987)

Comes now the guardian ad litem for the children and states as follows:

1. On June 6, 1985, the court entered a dispositional order placing the children in the temporary care, custody, and control of the Department of Human Services.

2. Employees and agents of the Department of Human Services have repeatedly failed to protect and promote the best interests of the children since that time.

3. The children were involuntarily removed from the foster home of L. and P.M. on January 8, 1987, contrary to their best interests.

4. Since that time the children have been separated from each other and placed in very restrictive environments.

5. The children have been denied free and unmonitored contact with each other, their psychological parents, L. and P.M. and with their attorney.

6. A.C.1 and A.C.2 have been repeatedly threatened with institutionalization even though they are not proper subjects for such an action.

7. Said actions by the Department have constituted psychological abuse of the children, and are completely without any justification which relates to the best interests of the children.

WHEREFORE, the guardian ad litem for the children prays that the care and custody of the children be transferred from the Department of Human Services to their former foster parents, L. and P.M.

/s/ Jane Harlan
JANE HARLAN
Guardian and Litem for the Children.
300 Midtown Building
Newton, Iowa 50208
(515) 792-9934

Copies to:

Cliff Wendel, Assistant Jasper County Attorney
Gerald B. Feuerhelm

Jasper County Department of Human Services

IN THE SUPREME COURT OF IOWA

IN THE INTEREST OF	•	S.Ct. No. 87-43
	•	
A.C., A.C., S.C., S.C., and J.C.,	•	RESPONSE TO STATEMENT IN RESPONSE TO ORDER OF AUGUST 18, 1987
Children.	•	

COMES NOW the Appellee-State and, in response to the statement of the guardian ad litem regarding her continuing participation in this appeal, states as follows:

1. That the State does not contest the guardian ad litem's statements to the effect that:

a. The guardian ad litem has represented the children for two years;

b. The guardian ad litem is familiar with the case;

c. The guardian ad litem has represented the express wishes of the two oldest children;

d. That no party to this appeal, or to the lower court jnvenile action, has objected to her continued representation on this appeal;

e. That the current guardian ad litem briefly appeared in this matter, and then withdrew his appearance, apparently in contemplation that the matter would be handled by the previous guardian ad litem.

f. That this office may have stated to the Jasper County Attorney's Office that it was not planning to raise the removal issue.

g. That the lower court did not specify whether the removal was intended to effect the existing appeal.

2. The Appellee-State does deny the statements:

a. That the removal of the guardian ad litem was "under questionable circumstances". *See* Appellee's Brief, Division VII.

b. That the question of the propriety of the removal of the guardian ad litem was properly preserved for appeal. *See* Appellee's Brief, Division VII.

c. That the children are currently being "held" in an unsatisfactory situation, or a situation that violates their rights. Absent a motion for stay, such an allegation is improper, as the State would be required to go beyond the existing appellate record to respond to it.

3. The State does not resist continued participation by former guardian ad litem Jane Harlan because:

a. There would be a value to the juvenile justice system to have this matter adjudicated on the merits. Removal of this particular attorney may mean removal of the only party in favor of reversal.

b. The State wishes to avoid the actuality of, or the appearance of, obtaining a favorable resolution of this matter by the elimination of the only dissenting party.

c. The chief ground for removal of the guardian ad litem was that the guardian ad litem was not acting in the children's best interests. (App. 939-940.) That ground may not require her elimination as appellate counsel, as opposing view points concerning the children's welfare are being fully represented on this appeal.

WHEREFORE, the Appellee-State does not object to the continuation of this appeal with current counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause by depositing a copy thereof in the U.S. Mail postage prepaid, in envelopes addressed to each of the attorneys of record herein at their respective addresses disclosed on the pleading, on the 3rd day of September, 1987.

/s/ Jane C. McCallom